UNITED STATES GOVERNMENT
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 26

DAVIDSON TRANSIT ORGANIZATION
Employer

and

NASHVILLE TRANSIT ASSOCIATION[1] **Case 26-RC-8492**
Petitioner

and

AMALGAMATED TRANSIT UNION,
LOCAL No. 1235
Intervenor

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTION

The Employer, Davidson Transit Organization, is a not-for-profit Tennessee corporation which provides intrastate bus transportation services in Davidson County, Tennessee. Local 1235 of the Amalgamated Transit Union, the Intervenor, currently represents a unit of employees who work out of the Employer's Nashville, Tennessee facility performing transportation services, truck and automotive repair work, fare collection, and other related work. The Petitioner filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent the bargaining unit

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[1] The Petitioner's name appears as corrected at hearing.

employees currently represented by the Intervenor. There are approximately 325 employees in the unit.

Following a hearing before a hearing officer of the Board, the Employer and the Intervenor filed briefs with me.[2] As evidenced at the hearing and in the Intervenor's brief, this case presents three main issues: (1) whether the Petitioner is a "labor organization" within the meaning of Section 2(5) of the Act; (2) whether three parts technicians A should be excluded as managerial employees; and (3) whether the references to the "two-way radio system" and "intercom system" should be included in the unit description.[3] The Employer and the Intervenor contend that the petition should be dismissed because the Petitioner is not a labor organization. The Petitioner disagrees with that position. The Employer also contends that the three parts technicians A should be excluded as managerial, while the Petitioner and Intervenor urge inclusion of those employees. The Employer further contends that references to the two-way radio system and intercom system should be deleted from the unit description, while

[2] The Petitioner did not file a post-hearing brief. The brief submitted by the Employer was rejected and not considered because the only timely copy was submitted by facsimile transmission, which is not permitted under Section 102.117(g) of the Board's Rules and Regulations. Subsequent to the rejection of its brief, the Employer filed a request to refile its brief. In that request, the Employer explains that the brief was not properly filed because of "administrative error" and argues that the parties would not be adversely affected or prejudiced by granting its request. Although the request states that briefs were to be due or postmarked by February 22, 2006, that is not correct. Briefs were due February 22, 2006. Inasmuch as the Board's rules do not provide for late filing under the circumstances present here, I am denying the Employer's request to refile its post-hearing brief.

[3] In its brief, the Intervenor contends that the petition should be dismissed because of a lack of a showing of interest. By letter dated February 23, 2006, the Intervenor was advised that the Region's administrative investigation revealed that the Petitioner's showing of interest was adequate. With regard to the Intervenor's reliance on testimony by Petitioner representative Thompson about the showing of interest, I have concluded that both the actual language on the showing of interest and the number of signatures were sufficient.

the Petitioner and Intervenor argue those terms should remain. After careful consideration of these issues, I have concluded that the Petitioner meets the statutory definition of a labor organization and that the evidence is insufficient to find that the parts technicians A are managerial and that the references to the two-way radio and intercom system should remain in the unit description. Accordingly, I have directed an election in the unit agreed to by the parties with the addition of the parts technicians A and the inclusion of the two-way radio system and intercom system work.

In addition to the aforementioned matters, and although not specifically raised by any party, the issue of a contract bar warrants a brief discussion. The Employer and Intervenor had a three-year collective bargaining agreement that expired on October 31, 2005. Although the contract contains an automatic renewal provision, neither party to the agreement claimed at the hearing that this provision ever became effective. Intervenor's counsel represented at the hearing that in early November 2005, the Intervenor and the Employer entered into an open-ended extension agreement that continued in effect at the time of the hearing in this matter. However, no copy of this extension agreement was offered into evidence at the hearing.

I note that the Board has long held that contracts having no fixed duration will not be considered a bar to a representation petition. See e.g., *Pacific Coast Assn. of Pulp & Paper Mfrs.*, 121 NLRB 990 (1958). In *Frye & Smith, Ltd*., 151 NLRB 49, 50 (1965), the Board specifically held that an extension agreement would not operate as a bar to a petition if the extension was for an indefinite

term. See also, *Crompton Company, Inc*., 260 NLRB 417, 418 (1982). In light of the foregoing, I find that there is no bar to the instant petition.

I. WHETHER PETITIONER IS A LABOR ORGANIZATION UNDER SECTION 2(5) OF THE ACT

Having determined that the petition is not barred, I turn to the issue of whether the Petitioner, Nashville Transit Association, qualifies as labor organization. The term "labor organization" is defined in Section 2(5) of the Act as:

> any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work (29 U.S.C. Sec. 152[5]).

A. FACTS

At the hearing, Dujuan Thompson, an employee who has worked as a bus operator for the Employer for 12 years, testified concerning Petitioner's status. Thompson testified that he is a representative of the Petitioner and that there are no officers of the newly formed association. Thompson further stated that Petitioner is comprised solely of employees, is not affiliated with any other union or labor organization, and that at least two informal meetings of employees have been conducted in which the matters discussed included wages, salaries, issues and problems with management, the representation of employees, the grievance process and retirement. Thompson acknowledged that this association of employees is in its infancy, with no officers, bylaws or formal organization

documents yet in existence. Thompson stated that they planned to elect officers in the future.

The association has not filed any documents with the United States Department of Labor and has no books, ledgers, or financial documents bearing its name. Thompson further acknowledged that Petitioner had not made any formal demand to bargain with the Employer prior to filing the petition in this case and has not yet discussed wages, hours or working conditions with the Employer.

Neither the Intervenor nor the Employer presented any witnesses to challenge Thompson's testimony.

B. ANALYSIS

For unrepresented employees collectively to constitute a labor organization, it must be shown that: (1) that employees participate in the organization; and (2) that the organization exists, in whole or in part, for the purpose of dealing with employers concerning wages, hours, and other terms and conditions of work. *Alto Plastics Mfg*. *Corp.*, 136 NLRB 850, 851-52 (1962). Accord: *Coinmach Laundry Corp.*, 337 NLRB 1286 (2003). Here, the record evidence of employee participation in at least two meetings aimed at the formation of Petitioner is undisputed. To satisfy the second element, it is not necessary to establish that any particular objective has been accomplished, but only that one of the statutory purposes is among the reasons for the Petitioner's existence. Here, the uncontroverted evidence clearly demonstrates that the Petitioner was created for the purpose of dealing with the Employer concerning a wide range of issues of concern to employees, including grievances, employee

benefits and conditions of work. I reject the Intervenor's contention that the Petitioner's lack of assets, officers or structural formality preclude me from finding it to be a labor organization at this time. See *Advance Industrial Security, Inc.*, 225 NLRB 151 (1976); *Butler Manufacturing Company*, 167 NLRB 308 (1967).

Accordingly, I find the Petitioner has met the statutory prerequisites of qualifying as a labor organization under Section 2(5) of the Act.

II. WHETHER THE PARTS TECHNICIANS A SHOULD BE EXCLUDED AS MANAGERIAL EMPLOYEES

At the hearing, the Employer asserted that three employees classified as parts technicians A should be excluded from the bargaining unit as managerial employees.[4] Both the Intervenor and Petitioner opposed the exclusion of these employees because this classification historically has been included in the bargaining unit and because these employees lack managerial authority.

A. FACTS

Employee Peter Baker was the only witness to testify concerning the duties and authority of employees in the parts technician A position. Baker held that position for about two years, ending approximately one and one-half years ago. Baker testified that the three employees in question historically have been included in the unit and are paid the same scale as an A-level mechanic, a bargaining unit position.

[4] The employees holding the position of parts technician A at the time of the hearing were Robert Basken, Gary Hobbs, and Richard Roberts.

According to the job description for the parts technician A position, they are responsible for record keeping and for receiving, storing, controlling, and issuing materials, supplies, and equipment to employees. They work out of the maintenance storeroom and issue a request for materials and supplies, ship necessary materials, and perform quality control on all received materials. The parts technicians A take inventory three times a year. With regard to ordering parts, Baker testified that orders must be approved by Purchasing Supervisor Marilyn Daniels or the maintenance supervisor. Baker explained that while holding the parts technician A position, he had never ordered parts without someone else's permission and had never been involved in formulation of management policies or in labor relations.

Baker testified that he never saw employees in the disputed classification issue discipline, evaluate, hire or fire any other employee. Baker further testified that as a union steward, he had never seen any parts technicians A employees represent management in any matters. There was no testimony indicating that the parts technician A employees assigned or directed the work of any other employees, nor was there any indication that this disputed classification had changed since Baker held this position.

B. ANALYSIS

Managerial employees are defined as those employees who "formulate and effectuate management policies by expressing and making operative the decisions of their employer and those who have discretion in the performance of jobs independent of their employer's established policies." *Tops Club, Inc.*, 238

NLRB 928 fn. 2 (1978), citing *Bell Aerospace, A Division of Textron, Inc.*, 219 NLRB 384 (1975). I conclude that based upon Baker's uncontroverted testimony, there is insufficient evidence to find that the parts technicians A possess or exercise managerial authority. Accordingly, inasmuch as they have historically been included in the bargaining unit, I will include the parts technicians A in the unit found appropriate here.

III. INCLUSION OF THE "TWO-WAY RADIO SYSTEM" AND "INTERCOM SYSTEM" WORK IN THE UNIT DESCRIPTION

Currently there are no employees classified as "two-way radio" or "intercom system" employees but this work has been performed by unit employees for many years. Employee Baker explained that repair and maintenance on the two-way radios is performed by employees classified as mechanics. With regard to the intercom system in the Employer's building, that work is performed by a building maintenance employee who is a maintenance employee included in the existing bargaining unit. At hearing, the Employer argued that these terms should be deleted from the unit description because they are antiquated and no longer reflect position titles.

I am unpersuaded by the Employer's argument for two reasons. First, the unit description in the collective-bargaining agreement describes the unit both by the type of work performed and by job classifications. For example, the position title "mechanic" is not found in the unit description, but the terms "truck repair" and "automotive repair", which describe the type of work performed, are contained in the unit description. Second, the uncontroverted testimony of Baker

indicates that work on bus and building intercom systems and work on two-way radios have always been performed by unit employees and that such work continues at present. Since the evidence establishes that these terms are still relevant descriptive terms for unit work, I conclude that they should remain in the unit description.

IV. CONCLUSIONS AND FINDINGS

Based on the entire record in this proceeding, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.[5]

2. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The Petitioner and Intervenor claim to represent certain employees of the Employer.

4. Both the Petitioner and the Intervenor are a labor organization within the meaning of Section 2(5) of the Act.

5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

[5] With regard to the Employer's objections that certain of the hearing officer's questions of Petitioner representative Thompson were leading and conclusory, I note that subsequent to the hearing officer's questions both the Employer and the Intervenor fully developed the record on the issue of the Petitioner's status as a labor organization. Accordingly, I find that no prejudicial error resulted from the hearing officer's questions and rulings on that issue.

6. The following employees of the Employer constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> **INCLUDED:** All full-time and regular part-time employees who are employed in transportation work, truck repair, automotive repair, two-way radio system, fare collection system, intercom system and AccessRide work, parts technicians A, general helpers, janitors and laborers, delivery clerk, and transit mall custodian employed at the Employer's Nashville, Tennessee location.
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> **EXCLUDED:**[6] Accounting supervisor, transit travel trainer, service planning supervisor, and all office clerical employees, professional employees, guards and supervisors as defined in the Act, which include maintenance supervisors, operations supervisors, program manager, safety and security manager, customer service supervisor, purchasing supervisor, fleet manager, customer service manager, AccessRide manager and training manager.

V. DIRECTION OF ELECTION

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by ***Nashville Transit Association; Amalgamated Transit Union, Local No. 1235; or neither***. The date, time and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

[6] At the hearing, the parties agreed that Accounting Supervisor Ngoc-chau T. Nguyen, Transit Travel Trainer Judy J. Shelton, and Service Planning Supervisor Tammy E. Tate should be excluded from the unit either as office clerical employees or as supervisors under Section 2(11) of the Act. Inasmuch as the parties are in agreement on the exclusion of the positions, they are excluded from the unit found appropriate here.

A. Voting Eligibility

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike, which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be

used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). The list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). This list may initially be used by me to assist in determining an adequate showing of interest. I shall, in turn, make the list available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, The Brinkley Plaza Building, 80 Monroe Avenue, Suite 350, Memphis, TN 38103-2416, on or before **March 15, 2006**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (901) 544-0008 or at (615) 736-7761 or may be sent by e-mail to **Region26@nlrb.gov or Resnash@nlrb.gov**. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the list will be made available to all parties to the election, please furnish a total of **three** copies, unless the list is submitted by facsimile or e-mail,

in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Service*s, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

VI. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001. This request must be received by the Board in Washington by **March 22, 2006.** The request may not be filed by facsimile.

DATED: March 8, 2006

/S/[Ronald K. Hooks]

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Ronald K. Hooks, Regional Director
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